U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 25 October 2004

CASE NO.: 2003-LHC-1821

OWCP NO.: 06-177253

IN THE MATTER OF

CLYDE STOKES,
Claimant

v.

TEAM POWER OF FLORIDA,
Employer

and

LEGION INSURANCE COMPANY,
Carrier

APPEARANCES:

John W. Merting, Esq.
On behalf of Claimant

James P. Green, Esq.
On behalf of Employer

BEFORE: C. RICHARD AVERY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq., (The Act), brought by Clyde Stokes

(Claimant) against Team Power of Florida (Employer) and Legion Insurance Company (Carrier). The formal hearing was conducted in Pensacola, Florida on August 2, 2004. Each party was represented by counsel, and each presented documentary evidence, examined and cross examined the witnesses, and made oral and written arguments.[1] The following exhibits were received into evidence: Joint Exhibit 1, Claimant's Exhibits 1-5 and Employer's Exhibits 1-11. This decision is based on the entire record.[2]

Stipulations

Prior to the hearing, the parties entered into joint stipulations of facts and issues which were submitted as follows:

1. The injury/accident occurred on July 14, 1998;
2. The injury/accident was in the course and scope of employment;
3. An employer/employee relationship existed at the time of the injury/accident;
4. Employer was advised of the injury/accident on July 14, 1998;
5. Notices of Controversion were filed April 20, 1999, January 29, 2003, and April 9, 2003;
6. An informal conference was held on March 25, 2003;
7. The average weekly wage at the time of injury was $219.00;
8. Temporary total disability and temporary partial disability were paid;
9. Medical benefits were paid;
11. Permanent disability and impairment rating is 5%; and
12. Date of maximum medical improvement is February 15, 1999.

Issues

The unresolved issues in this proceeding are:

[1] The parties were granted time post hearing to file briefs. This time was extended up to and through September 2, 2004.

[2] The following abbreviations will be used throughout this decision when citing evidence of record: Trial Transcript Pages- "Tr. __"; Joint Exhibit- "JX __, pg.__"; Employer's Exhibit- "EX __, pg.__"; and Claimant's Exhibit- "CX __, pg.__".

1. Nature and Extent of Disability, including whether Employer/Carrier was entitled to reduce Claimant's total temporary disabled benefits from $208.94 per week to $45.92 per week;
2. Attorney fees and expenses.

Statement of the Evidence
Testimonial Evidence

Claimant is a 39 year old married father of two who lives in Pensacola, Florida. Claimant testified that he did not recall exactly what grade level he completed in school, but did receive a diploma through an adult high school program. His prior work history consists of working with his family performing cement finishing and brick-laying. There is a large gap in Claimant's work history due to a period of incarceration, which Claimant stated was 10-14 years. He stated he has not had any problems with the law since his release from prison.

Following his release from prison, Claimant became employed by Respondent Team Power of Florida, working as a longshoreman at the Port of Pensacola. Claimant testified that he worked in this position for eight or nine months before being involved in an accident at work. On July 14, 1998, Claimant was three floors down in the hold of a ship, unloading pallets, when while bending over, his back "popped" and he fell backwards, hitting his back and head. Claimant stated that he tried to move but could not do so, and that he was pulled out of the hold in a basket attached to a crane.

Claimant testified that he has "lots of headaches," that his neck bothers him because it is stiff, and that he has pain in his right arm, his back, and down his right leg. He was prescribed a cane which he uses to ambulate because his right leg gives out, and reported that he has fallen a couple of times. He stated he must move slowly to avoid back pain. Lying down sometimes alleviates his pain, but at other times makes it worse. He sleeps five or six hours per night and must take breaks to rest every few hours throughout the day.

Claimant stated he has not worked since sustaining his injuries, but did apply for some of the jobs identified in a labor market survey conducted by Sheryl West, a vocational rehabilitation specialist. Claimant testified that his wife brought him to apply for jobs and assisted him in filling out applications. In addition, he applied of his own volition at Concord Custom Cleaners, Wendy's, McDonald's and Krystal, but was not ultimately offered employment. Claimant testified that he

loved working at the Port of Pensacola and would still be working there had he not been injured.

On cross-examination, Claimant agreed that he had a history of prior back problems and had visited Baptist Hospital two to three months before the accident complaining of low back pain. He was diagnosed at that visit with chronic low back pain. He said that he had visited Baptist's emergency room a number of times both before and since the accident, but could not recall the exact dates. Claimant claimed that when he was taken to the emergency room immediately following the accident, he told physicians there that he had slipped on ice while in the hold. He said that he could not recall whether he had made multiple return visits to the emergency room for pain medications. He could not recall whether his hospital chart had been flagged by the hospital for drug-seeking behavior.

Claimant testified that he applied for jobs in February and March of 2003, but did not apply for any from the date of the accident until early 2003, nor had he applied for any since. He stated that he called a couple of the potential employers back to follow-up. He also stated that he disclosed his criminal history on the job applications.

When asked about his current activities, Claimant stated that he does not do much, but sits down most of the time, and because he is constantly in pain, he takes a lot of medicine. He said that he does not drive, so his wife drives the children to school. Claimant stated that he frequently goes to the hospital to get medicine and that he was getting Lortab and Ibuprofen from the community clinic until his Medicaid was discontinued.

On redirect examination, Claimant testified that his wife read to him the criminal history disclosure statement on some of the job applications so he answered the questions honestly. He noted that he had difficulty obtaining benefits and medical care following his injury and that he went almost a year without receiving compensation. To support his family during that time, his wife worked as a nurse and they also received assistance from a church group.

Sheila Justice, M.S.

Ms. Justice is a vocational rehabilitation specialist at North Florida Rehabilitation Consultants in Pensacola. She has been employed in the vocational rehabilitation field in North Florida for 21 years. Ms. Justice testified that she evaluated Claimant at request of his counsel for the purpose of determining his employability. Her report comprises Claimant's Exhibit 2.

Ms. Justice testified that in making her determination regarding Claimant's employability, she interviewed and evaluated Claimant and conducted a review of his medical records. She also reviewed the labor market survey and vocational report generated on November 21, 2002 by Sheryl West, another vocational rehabilitation specialist.

Based on the above information, Ms. Justice was of the opinion that there was no suitable alternative employment available for Claimant. She stated that Claimant would be extremely difficult, if not impossible, to place for several reasons, including IQ testing which demonstrated that Claimant functions at a borderline mentally retarded range, a lack of transferable work skills, being limited to light sedentary work, being out of work for six years which resulted in no recent work history, and his criminal conviction.

Ms. Justice reviewed the eight jobs identified by Ms. West, and based on Claimant's physical restrictions as determined by Dr. Johns, who performed an independent medical examination and imposed restrictions in the light category, and the results of a functional capacity evaluation, she testified that none of the identified positions were suitable. Ms. Justice explained that she relied heavily on a functional capacity evaluation (FCE) conducted on January 31, 2002 in reaching her decision because it provided the most objective measurement of physical restrictions and limitations. She noted that the FCE revealed that Claimant can only perform work at the sedentary level with the imposition of additional restrictions, including the use of a cane.

Ms. Justice explained that of the eight positions identified by Ms. West, all were classified as unskilled and therefore were at a skill level that Claimant was capable of performing, however, in her opinion they were all definitely beyond Claimant's exertional or physical demand capabilities. For example, she noted that because Claimant uses a prescribed cane, he cannot realistically perform as a food delivery person, one of the positions identified in the labor market survey.

For the above reasons, and based on her 21 years of experience in the local labor market, Ms. Justice concluded that Claimant would be difficult to employ. In addition, she noted that unskilled labor comprises the largest pool of all potential employees, thus there is tremendous competition for most of these jobs, which compounds the difficulty of Claimant finding employment.

On cross-examination, Ms. Justice said that Claimant did not explain to her how the accident occurred, rather, she obtained information from his records. In addition, Claimant did not say anything about slipping on ice. Ms. Justice also testified that the FCE stated that Claimant had been in a car accident two days before the FCE was conducted. Ms. Justice agreed that as a result, there was no way to ascertain what limitations evident in the FCE might be due to the work-related injury as opposed to the car accident.

Ms. Justice testified that there are 137 unskilled jobs listed in the Dictionary of Occupational Titles, and Claimant would be qualified for a number of those jobs in terms of skill level, but some jobs would be eliminated given his sedentary restrictions as determined by the FCE and the use of a cane. She opined the end result would be that Claimant would in reality qualify for few, if any, of the identified jobs. She also stated that when she interviewed Claimant, he stated that he did not drive on a regular basis, but the FCE indicated that Claimant was able to drive short distances.

Medical Evidence

Employer's Exhibit 9 consists of Baptist Hospital's emergency room records, including the records pertaining to a visit on April 16, 1998 where Claimant complained of, among other things, low back pain. The records related to Claimant's visit on the date of the accident, July 14, 1998, state that Claimant slipped on ice at work and complained of lower back and neck pain. Claimant was prescribed Lortab and told to rest and follow up with a worker's compensation doctor. Claimant returned to the Baptist emergency room on July 16, 1998, complaining of neck and back pain and requesting stronger pain medication. He presented again on July 26, September 7 and October 17, 1998, with the same complaints of neck and back pain.

Claimant was referred by Baptist Hospital to Dr. Ruben B. Timmons, whose records are located at Claimant's Exhibit 4-D and Employer's Exhibit 5. Dr. Timmons examined Claimant on August 14, 1998, and noted that Claimant demonstrated no neurological or motor deficits, but did have marked spasms and tenderness along the lumbar paravertebral musculature. Dr. Timmons recommended an MRI of the lumbar spine as well as physical therapy. The MRI results are located with Dr. Timmons' records and state that the diagnostic test revealed left L4-5 herniation or protrusion and L5-S1 disc bulge with right sided annular tear and right foraminal narrowing.

Claimant also saw Dr. M.L. Woodruff, a chiropractor at the Gulf Coast Spinal Center. Dr. Woodruff's records are located at Claimant's Exhibit 4-C and Employer's Exhibit 7. At the initial visit on August 17, 1998, the records show that Claimant presented with lumbar and neck pain as well as significant spasm and a greatly altered posture. Dr. Woodruff noted that Claimant had symptoms immediately after the accident, but they had gotten progressively worse with the most significant exacerbation occurring within the three days prior to the visit. Claimant was diagnosed with lumbar strain/sprain, cervical strain/sprain, and myofasciitis, myositis, myalgia, and daily physical therapy was ordered.

Claimant returned to Dr. Woodruff on a frequent basis and the records show that he usually presented with the same complaints including neck, dorsal and lumbar pain with spasm. Claimant reported these symptoms on August 19, 21, 24, 25, 27, 28 and 31. The records of several of these visits reported Claimant had decreased symptoms after chiropractic treatment. This pattern continued to occur on September 1, 2, 4, 8, 9, 11, 14, and 18. The note regarding Claimant's last visit on September 18 stated that he was making a slow recovery, and that Claimant reported relief after treatment but his pain was exacerbated between visits. Claimant had notable fixations in his neck, mid and low back, and limited range of motion in all lumbar spine ranges.

Dr. Paul Turner is a neurosurgeon in Pensacola to whom Claimant was referred by Dr. Woodruff. Dr. Turner's records comprise Claimant's Exhibit 4-A and Employer's Exhibit 6. Claimant's initial visit to Dr. Turner occurred on November 24, 1998, where Claimant stated the chiropractic treatment he had received had not been helpful. Dr. Turner noted that Claimant's medical records stated he had previously complained of head and neck pain but did not mention such pain to Dr. Turner.

Dr. Turner evaluated Claimant's MRI that was performed in September 1998 and noted some degenerative changes at the L4-5 and L5-S1 level and mild disc protrusion at the left side L4-5. Dr. Turner also noted a very minor bulge to the L5-S1 disc but without any nerve root entrapment on either level. He stated that the rest of the scan appeared normal. On physical exam, Dr. Turner found that Claimant had an abnormal gait, that Claimant kept his back muscles quite tight and had a restricted range of motion in his back.

Dr. Turner opined that Claimant's leg pain was related to a spraining injury and that Claimant could have annular tears from such injury. He believed Claimant's leg pain was referred pain from the spraining injury in the low back,

not due to any nerve root entrapment. He was of the opinion that Claimant's abnormal gait was learned behavior in dealing with back pain.

Dr. Turner did not recommend any surgical procedures for Claimant because he felt that Claimant may have some annular tear and disc dysfunction which was not likely to respond to surgery. Dr. Turner noted that Claimant requested Lortab to take regularly. Dr. Turner gave him one prescription but did not believe that Claimant should be on regular pain medication for an indefinite period of time. Dr. Turner saw no need for Claimant to continue taking muscle relaxant medication. Dr. Turner's notes indicate he recommended that Claimant be referred to a physical medicine physician. He did not think Claimant would respond to injection therapy, nor did he schedule a follow-up appointment, because he did not feel that Claimant needed ongoing neurosurgical care. Dr. Tuner concluded that Claimant would remain disabled for some time.

In response to a letter from Carrier dated December 3, 1998, Dr. Turner diagnosed Claimant with lumbar sprain including annular tear and estimated his disability to last six to eight months. He suspected Claimant could be released to light duty on January 15, 1999 provided he was referred to a physical medicine physician to assume his care. Dr. Turner listed the anticipated date of maximum medical improvement as February 15, 1999, and anticipated a 5% permanent partial impairment rating.

Claimant was referred by Carrier to Dr. Shane VerVoort, a physical medicine and rehabilitation specialist in Pensacola. Dr. VerVoort's record is located at Claimant's Exhibit 4-I and Employer's Exhibit 8. The record shows that Claimant visited Dr. VerVoort on February 5, 1999, and at that time the appointment was terminated by Dr. VerVoort because he felt that Claimant was irritated and argumentative. Dr. VerVoort's note indicates that he felt it was not worth his effort to establish a doctor-patient relationship because he felt Claimant was resistant to intervention, so he terminated the interview.

Carrier referred Claimant to Dr. Lawrence L. Prokop, another physical medicine specialist, whose notes comprise Claimant's Exhibit 4-B and Employer's Exhibit 4. At Claimant's initial appointment on March 23, 1999, he complained of intermittent central low back pain which extended down the lower right extremity and occasionally to the left extremity. Claimant stated raising his leg made the pain worse, but lying on his back made it better. Claimant also complained of constant neck pain. After conducting a physical examination, Dr. Prokop concluded that Claimant had bilateral L5-S1 radiculopathy, somatic dysfunction of

the lumbosacral spine, pelvis, and right lower extremity, history of scoliosis which would likely slow Claimant's improvement, and probable borderline intellectual functioning. Dr. Prokop ordered an x-ray of the lumbar spine, EMG nerve conduction studies and prescribed Relafen, an anti-inflammatory.

Claimant visited Dr. Prokop again on March 31, 1999 where he complained of no improvement with the Relafen and requested Lortab. After completing a physical exam, Dr. Prokop noted improvement in the lumbosacral radiculopathy and explained to Claimant that there was improvement, though not enough to result in decreased discomfort. Dr. Prokop noted significant improvement in Claimant's lower extremity strength while taking Relafen. He refused to prescribe Lortab, but did give Claimant Flexeril and Darvocet with instructions to return in one week, but there are no further records indicating a return visit.

Claimant returned to Dr. Turner, the neurosurgeon, on March 13, 2000. (EX 6 & CX 4-A). Dr. Turner noted that he had not seen Claimant in a year and four months, but Claimant presented with the same complaints he had at the previous visit, namely low back pain and pain into his right leg and a bit of pain to the left leg. Dr. Turner noted that Claimant had somewhat of a "magical" view of his injury in that he did not believe he was a candidate for any kind of rehabilitation and did not believe he would ever work again. However, Dr. Turner determined that Claimant had gone over a year without any improvement and was still "quite disabled."

Claimant returned on October 23, 2000, whereupon Dr. Turner reviewed the results of a lumbar spine MRI conducted on August 25, 2000. Dr. Turner noted that the MRI revealed progressive degeneration at L4-5 and L5-S1, as well as end-plate changes at L5-S1 and an area of annular tears. Dr. Turner opined that Claimant continued to be quite disabled, more so than he would expect given the MRI results, the time and the injury. He noted that Claimant continued to use the cane and walked with an abnormal gait.

Dr. Turner determined Claimant was not a candidate for any discectomy or other procedure in terms of nerve elements in his lumbar spine. He stated that given the amount of degeneration that has occurred at the L5-S1 level over time, a fusion could be considered as a way to relieve many of Claimant's symptoms, but to do so would be an undertaking with an undetermined result, so Dr. Turner would not recommend the procedure. Dr. Turner did not schedule a follow-up appointment with Claimant.

On August 21, 2001, Claimant saw Dr. Nelson Oyesiku, a physician in the Neurosurgery section of the Emory Clinic in Atlanta, Georgia. These records are located at Claimant's Exhibit 4-H and Employer's Exhibit 1. Claimant presented with low back pain and right extremity pain. Dr. Oyesiku noted that Claimant had significant degenerative disease at L4-5 and L5-S1 with neural foraminal stenosis, causing right-sided radicular pain without any significant focal deficit on neurological exam. After completing an exam and reviewing Claimant's MRI, Dr. Oyesiku concluded that Claimant had degenerative cervical spondylosis, which was ultimately best treated by performing a fusion. Dr. Oyesiku recommended that Claimant be referred to a colleague, Dr. Brian Subach, who had expertise in neurosurgical spinal surgery, for a surgical opinion and evaluation.

Claimant saw Dr. Subach on September 5, 2001. His records are located at Claimant's Exhibit 4-B. After examining Claimant and reviewing his medical records, Dr. Subach stated he was concerned about the severity of Claimant's back pain, but it appeared that Claimant's leg pain had diminished in severity and frequency. Dr. Subach opined that Claimant had axial back pain that was exacerbated by forward flexion and extension, which may be a combined problem for both diskogenic disease and facet arthropathy. Dr. Subach ordered x-rays and another lumbar MRI.

In a note dated October 3, 2001, Dr. Subach stated he had reviewed the diagnostic tests he ordered and that the x-rays evidenced degenerative disc disease, most prominently at L4-5 and L5-S1. The MRI showed that the L4-5 and L5-S1 discs to be degenerated and desiccated. There was some evidence of foraminal stenosis at both L4-5 and L5-S1, which Dr. Subach opined could be responsible in part for Claimant's intermittent lower extremity pain. In a note dated November 19, 2001, Dr. Subach stated that the degenerated and desiccated discs were partially responsible for Claimant's back discomfort. Dr. Subach opined that Claimant was not a surgical candidate, and that he told Claimant to follow up with his primary care physician for further management. In a letter to Carrier dated December 3, 2001, Dr. Subach reiterated his impressions as discussed above and stated that having only met Claimant once as a consultant, he did not feel comfortable giving an impairment rating or date of maximum medical improvement.

Dr. Dale K. Johns, a neurosurgeon in Fort Walton Beach, Florida, performed an independent medical examination of Claimant on September 10, 2001. His records are located at Claimant's Exhibit 4-F and Employer's Exhibit 10. Dr. Johns' notes indicate that upon exam, Claimant complained of constant neck and

low back pain, as well as intermittent right leg pain. Claimant stated that walking, sitting and standing all increased his pain. Dr. Johns noted that Claimant stated the pain he was experiencing at the time of the exam was essentially the same as that which he had immediately following the accident, and at times it was worse. Claimant described the pain as dull and aching. Dr. Johns noted that Claimant stated that he was unable to sit for prolonged periods of time and must have his back against a hard surface.

After examining Claimant and reviewing his records, Dr. Johns' impressions were that Claimant suffered from chronic lumbar strain, lumbar degenerative joint and disc disease, and mild intermittent cervical strain. Claimant told Dr. Johns that new MRIs were to be performed in Atlanta, and Dr. Johns agreed that this was appropriate, but he stated Claimant was not a surgical candidate.

In a letter to Carrier dated July 27, 2001, Dr. Johns agreed with Dr. Turner that Claimant had reached MMI with a 5% impairment rating. Dr. Johns listed Claimant's restrictions and limitations as no lifting over 30 pounds, not to bend, kneel or stoop frequently, and not to sit longer than one hour without changing positions. When asked if Claimant could return to gainful employment, Dr. Johns stated he believed Claimant could perform "light duty progressing to moderate in three months."

On January 31, 2002, an FCE was conducted by Ruth Gronde, PT, MS, at the request of Dr. Oyesiku at the Emory Center for Rehabilitation. The report is Employer's Exhibit 1 and Claimant's Exhibit 4-H. Ms. Gronde determined that the overall test findings in combination with her clinical observations suggested the presence of variable effort on Claimant's behalf. Of the thirteen tested activities, six (climbing stairs, stooping, crawling, carrying, and pushing/pulling) were limited by Claimant's request to stop due to reports of increasing symptoms, reports of fear of falling, or complaints of fatigue. Because of incompletion, Ms, Gronde stated that Claimant's true physical maximum ability could not be determined from the results.

Ms. Gronde stated that the overall test findings and clinical observations suggested the presence of minimal symptom magnification on Claimant's behalf. She stated that Claimant did not attempt to grossly misrepresent his abilities, and his functional abilities were appropriate for his reported pain levels. Based on overall test results of material handling, Ms. Gronde determined that Claimant could perform carrying, lifting, pushing and pulling at a sedentary level,

specifically, not lifting more than 10 pounds occasionally or carrying more than 7 pounds occasionally.

Employer's Exhibit 3 & Claimant's Exhibit 4-E consists of a psychological evaluation conducted by Lawrence J. Gilgun, Ph.D., a licensed psychologist, on December 17, 1997. For purposes of evaluating Claimant, Dr. Gilgun conducted a mental status examination, clinical interview, and social history. He also administered the Rotter Incomplete Sentences tool, the Wechsler Adult Intelligence Scale, and the Wide Range Achievement Test. He noted that he attempted to administer the Minnesota Multiphasic Personality Inventory-2, but Claimant's reading ability was too poor to complete the test. The tests revealed Claimant's full scale IQ as 75. From these results, Dr. Gilgun concluded that Claimant functioned in the borderline mentally retarded range in verbal skills and in the low-average range in visual-spatial, perceptual-motor skills. The academic achievement test indicated that Claimant's reading and spelling level was at the fifth-grade equivalent and math was a seventh-grade equivalent. Dr. Gilgun concluded that Claimant had a host of functional limitations which would serve as substantial handicaps to competitive employment, including a spotty work history, lack of marketable skills, borderline mental retardation, severe deficits in reading and spelling, and limited training potential due to intellectual and academic difficulties.

Other Evidence

Sheryl West, a vocational evaluator and rehabilitation counselor in Destin, Florida, conducted a labor market survey on November 21, 2002. Her report is located at Claimant's Exhibit 1-A and Employer's Exhibit 2. Ms. West's report indicates that she attempted to find employment for Claimant applicable to his work history and then current physical and environmental restrictions as provided by Dr. Johns. She stated that Dr. Johns' restrictions were in the light duty category, including no lifting over 30 pounds, no frequent bending, stooping or crawling, and the ability to change positions if required to sit longer than one hour.

Ms. West noted that an FCE had been conducted, but stated that Claimant limited his performance and there was the presence of minimal symptom magnification. She did not discuss the findings of the FCE. Ms. West indicated that she contacted a local probation office as well as a job center regarding employment assistance for individuals with incarceration records.

The report generated by Ms. West indicates that she conducted a transferable skills analysis by reviewing the above information, interviewing Claimant, and considering Claimant's practical general educational development levels, aptitudes, and pre-injury temperament. The transferable skills analysis resulted in the identification of the following alternatives: cafeteria attendant, cafeteria waiter, kitchen food assembler, i.e. food tray assembler, dining service worker, tray setter, and food prep worker/server. These are unskilled or skilled positions, but require no previous work related skill, knowledge or experience.

Based on the alternatives identified by the skills analysis, Ms. West identified eight possible jobs for Claimant in the Pensacola area. These positions included food delivery for Porky's Pizza, kitchen food assembler positions at Lone Star Steak House, Copeland's Restaurant, and Peg Leg Pete's, food prep worker at Hungry Howie's Subs and Jerry's Cajun Café, kitchen food worker at Po' Folks, and table attendant/ kitchen food worker at Smokey's Real Pit Barbeque. The positions paid between $5.75 and $6.00 per hour as starting salary. Ms. West stated that the positions, as described by the contact person at each location, appeared to be within Claimant's vocational-educational and physical capabilities, and each location was accepting applications. However, Ms. West neither sought nor obtained medical approval of these jobs.

Claimant's Exhibit 2 consists of a vocational rehabilitation report compiled by Sheila Justice on July 8, 2004. As previously mentioned in regard to Ms. Justice's trial testimony, for purposes of completing the report she reviewed the medical records of Drs. Gilgun, Prokop, Turner, Johns, Oyesiku, and Subach, as well as the FCE and Ms. West's labor market survey. Ms. Justice concluded that it was highly unlikely that Claimant would be capable of securing and maintaining gainful employment and working on a sustained basis, and that the possibility of employment was very poor, based on his limited intellectual functioning, lack of transferable skills, and being limited to light and sedentary work.

Claimant's Exhibit 3 consists of documentation evidencing Claimant's attempts to secure employment. Included in the exhibit is a copy of the positions identified by Ms. West's labor market survey accompanied by handwritten notations evidencing Claimant's attempts to apply for these positions and the date contact was made. It appears that Claimant contacted six of the eight identified positions. Of the six, he spoke with a contact person or submitted an application at five, and there is a notation that one of the establishments did not exist. There are also copies of completed job applications for Custom Cleaners, Wendy's,

McDonald's, and Krystal, which Claimant testified he applied for on his own volition.

Findings of Fact and Conclusions of Law

The following findings of fact and conclusions of law are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing and upon an analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. In evaluating the evidence and reaching a decision in this case, I have been guided by the principles enunciated in *Director, OWCP v. Maher Terminals, Inc*., 114 S. Ct. 2251 (1994) that the burden of persuasion is with the proponent of the rule. Additionally, as trier of fact, I may accept or reject all or any part of the evidence, including that of medical witnesses, and rely on my own judgment to resolve factual disputes or conflicts in the evidence. *Todd Shipyards v. Donovan*, 300 F.2d 741 (5th Cir. 1962). The Supreme Court has held that the "true doubt" rule, which resolves conflicts in favor of the claimant when the evidence is balanced, violates § 556(d) of the Administrative Procedures Act. *Director, OWCP v. Greenwich Collieries*, 114 S.Ct. 2251, 28 BRBS 43 (1994).

Causation

Section 20(a) of the Act provides claimant with a presumption that his disabling condition is causally related to his employment if he shows that he suffered a harm and that employment conditions existed which could have caused, aggravated or accelerated the condition. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140 (1991); *Stevens v. Tacoma Boat Bldg. Co*., 23 BRBS 191 (1990). The Section 20(a) presumption operates to link the harm with the injured employee's employment. *Darnell v. Bell Helicopter Int'l, Inc.,* 16 BRBS 98 (1984).

Once the claimant has invoked the presumption the burden shifts to the employer to rebut the presumption with substantial countervailing evidence. *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283 (5th Cir,2003), *James v. Pate Stevedoring Co.*, 22 BRBS 271 (1989). If the Section 20(a) presumption is rebutted, the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280 (1935).

In this instance, Claimant and Employer stipulated in Joint Exhibit 1 that an injury/accident occurred on July 14, 1998 during the course and scope of Claimant's employment. I find that a harm and the existence of working conditions which could have caused that harm have been shown to exist, and I accept the parties' stipulation. Claimant clearly injured his back while working for Employer. The extent, duration and disabling effects of that injury, however, are in issue.

Nature and Extent

Having established an injury, the burden now rests with Claimant to prove the nature and extent of his disability. *Trask v. Lockheed Shipbuilding Construction Co.,* 17 BRBS 56, 59 (1985). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement (MMI). Id. at 60. Any disability before reaching MMI would thus be temporary in nature.

The date of maximum medical improvement is defined as the date on which the employee has received the maximum benefit of medical treatment such that his condition will not improve. The date on which a claimant's condition has become permanent is primarily a medical determination. *Mason v. Bender Welding & Mach. Co.,* 16 BRBS 307, 309 (1984). The date of maximum medical improvement is a question of fact based upon the medical evidence of record regardless of economic or vocational consideration. *Louisiana Insurance Guaranty Assoc. v. Abbott*, 40 F.3d 122, 27 BRBS 192 (CRT) (5th Cir. 1994); *Ballesteros v. Willamette Western Corp.,* 20 BRBS 184, 186 (1988); *Williams v. General Dynamics Corp.,* 10 BRBS 915 (1979). In this instance, both parties stipulated in Joint Exhibit 1 that Claimant reached MMI on February 15, 1999, as determined by Claimant's treating physician, Dr. Turner, and agreed to by Dr. Johns who performed the independent medical examination. I accept this stipulation and find that any compensation awarded after February 15, 1999 will be permanent in nature.

The question of extent of disability is an economic as well as medical concept. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968); *Eastern S.S. Lines v. Monahan*, 110 F.2d 840 (1st Cir. 1940). A claimant who shows he is unable to return to his former employment establishes a prima facie case of total disability. The burden then shifts to the employer to show the existence of suitable alternative employment. *P&M Crane v. Hayes, 930 F.2d 424, 430* (5th Cir. 1991); *N.O. (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038, 14 BRBS 1566 (5th Cir.

1981).[3] Furthermore, a claimant who establishes an inability to return to his usual employment is entitled to an award of total disability compensation until the date on which the employer demonstrates the availability of suitable alternative employment. *Rinaldi v. General Dynamics Corp*., 25 BRBS 128 (1991). If the employer demonstrates the availability of realistic job opportunities, the employee's disability is partial, not total. *Southern v. Farmer's Export Co*., 17 BRBS 64 (1985). Issues relating to nature and extent do not benefit from the Section 20(a) presumption. The burden is upon Claimant to demonstrate continuing disability (whether temporary or permanent) as a result of his accident.

The only doctor to comment with regards to Claimant's ability to physically return to work was Dr. Johns. Dr. Johns performed an independent medical evaluation of Claimant on September 10, 2001. He diagnosed Claimant with chronic lumbar strain and lumbar degenerative joint and disc disease. On July 27, 2001, Dr. Johns stated that Claimant could perform light duty progressing to moderate in three months. He imposed restrictions including no lifting over 30 pounds, no frequent bending, kneeling or stooping, and no sitting longer than one hour without changing positions.

There is no current opinion, medical or otherwise, which suggests that Claimant is physically capable of returning to his former position as a longshoreman, and neither party suggests that Claimant is capable of doing so. Therefore, I find Claimant has established a prima facie case of total disability.

In order to establish suitable alternative employment, an employer must show Claimant is capable of working, even if it's within certain medical restrictions, and there is work within those restrictions available to him. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-165 (5th Cir. 1981), *rev'g* 5 BRBS 418 (1977). An employer is not required to act as an employment agency for the claimant; rather, the employer must prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the claimant within the local community. *Turner*, 661 F.2d 1031, 1042-43. The employer must demonstrate that specific job opportunities exist which the employee could perform considering the claimant's age, education, work experience, and physical restrictions. *Edwards v. Director, OWCP*, 99 F.2d 1374 (9th Cir. 1993).

[3] Although this case arises in the 11th Circuit, all parties seem to agree that the principles set forth in *Turner* are controlling.

For the contended suitable alternative employment to be realistic, the employer must establish the job's precise nature, terms, and availability. *Thompson v. Lockheed Shipbuilding & Construction Co.*, 21 BRBS 94, 97 (1998). The administrative law judge must determine the claimant's physical and mental restrictions based on the medical opinions of record and apply them to the specific available jobs identified by the vocational expert. *Villasenor v. Marine Maintenance Industries, Inc.*, 17 BRBS 99 (1985). Once the employer demonstrates the existence of suitable alternative employment, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. *Fox v. West State Inc.*, 31 BRBS 118 (1997); *Hooe v. Todd Shipyards Corp.*, 21 BRBS 258 (1988).

It is my finding that Employer did not establish suitable alternative employment as of November 21, 2002. Ms. West's labor market survey identified several jobs which Ms. West stated were based on restrictions imposed by Dr. Johns, namely, no lifting over 30 pounds, no prolonged or frequent bending, kneeling or stooping, and no sitting longer than one hour without changing positions. The identified positions included food delivery worker, kitchen food assembler, food prep worker, and table attendant/kitchen food worker and paid between $5.75 and $6.00 per hour, and all indicated they were accepting applications at the time the labor market survey was conducted.

However, while Ms. West considered some factors pertinent to Claimant's employability, it is clear that she disregarded others. Ms. West's report reflects that she reviewed documentation establishing Claimant's IQ as 75, and she also considered Claimant's history of incarceration in formulating her report. Ms. West stated that she contacted a probation officer to inquire about employment assistance. However, in formulating her report and conducting the labor market survey, Ms. West relied only on the medical opinion of Dr. Johns, the IME doctor, who only saw Claimant on one occasion, and disregarded the opinion of Dr. Turner whose records stated on three occasions in November 1998, March 2000, and October 2000, that Claimant was "quite disabled." Also, Ms. West failed to seek or obtain a physician's approval of the jobs she identified.

Further, Ms. West discounted the FCE that was conducted on January 31, 2002, simply stating that the report indicated that there was minimal symptom magnification on Claimant's behalf and that Claimant limited his performance. However, the FCE report itself states that "six of the thirteen tested activities…were limited by [Claimant's] request to stop," and further stated that Claimant did not attempt to grossly misrepresent his abilities, and his functional

abilities were appropriate for his reported pain levels. (EX 1, CX 1). There is no discussion in Ms. West's report regarding the findings of the FCE based on the tests Claimant did complete, which determined Claimant's ability to be at the sedentary level, as opposed to the light restrictions imposed by Dr. Johns. As reported in the FCE, Claimant was only capable of lifting ten pounds occasionally, carrying seven pounds occasionally, and was not able to reach above shoulder level, crawl, climb stairs, stoop or kneel, and was only able to push or pull ten pounds occasionally, restrictions which Ms. West did not consider.

In her testimony at the hearing, Sheila Justice explained that she researched the jobs identified by Ms. West and found that all were at an appropriate skill level for Claimant because they were unskilled, but each of the jobs was classified as a medium physical level in the United States Department of Labor Dictionary of Occupational Titles. (Tr. p. 38-39). Ms. Justice explained that Claimant would not be capable of performing any of these jobs even if he was capable of performing work at the light level, as suggested by Dr. Johns, or the sedentary level, as suggested by the FCE, because these types of jobs involve frequent bending, stooping, and other postural limitations or requirements. Ms. Justice also pointed out additional factors hampered Claimant's chances of being employed, including Claimant's use of a cane, which was not mentioned in the labor market survey, which would affect his ability to perform the identified positions of food delivery worker or kitchen worker. She also stated that Claimant lack of reading and writing proficiency would render him ineligible for many sedentary jobs. Ms. Justice stated that additional limitations beyond physical restrictions existed that in her opinion contributed to rendering Claimant unemployable, including his lack of recent work history and criminal conviction.

Finally, the jobs identified by Ms. West's labor market survey are not accompanied by specific job requirements with which Claimant's physical restrictions may be compared. Ms. West stated in her report that "the positions described by the contact person [at each identified job] appeared to be within [Claimant's] vocational-educational and physical capabilities." (EX 1, CX 1). However, without establishing the precise requirements of each position, there is no way to compare the demands with the restrictions imposed on Claimant by Dr. Johns or the FCE, and consequently, no way to determine whether Claimant is physically capable of performing the identified jobs.

Notwithstanding my findings that Employer has failed to demonstrate suitable alternative employment, even assuming that suitable alternative employment was established by Employer, Claimant has shown that he engaged in

a diligent search for employment and was unsuccessful. Claimant's Exhibit 3 consists of the list of jobs identified in the labor market survey alongside handwritten notations indicating attempts to inquire regarding such employment, including dates, names of managers or contact people, and statements indicating Claimant filled out applications. In addition, Claimant applied for three positions of his own volition and copies of the applications are contained in the exhibit.

In sum, since Claimant was unable to return to his pre-injury employment as of July 14, 1998, he has established that he was totally disabled, and Employer has failed to establish the existence of suitable alternative employment that Claimant was/is capable of performing, considering his physical restrictions. Therefore, I find from the evidence presented that despite reaching maximum medical improvement on February 15, 1999, Claimant remains totally disabled because suitable alternative employment was not established by employer.

Section 14 (e) penalties

Under Section 14 (e) an employer is liable for an additional 10% of the amount of worker's compensation due where the employer does not pay compensation within 14 days of learning of the injury, or fails to timely file a notice of controversion within 14 days. 33 U.S.C. §914. In this instance, Employer paid compensation on July 22, 1998, eight days after the injury. Therefore, as Employer paid compensation within 14 days of learning of injury, no § 14 (e) penalties are assessed against Employer.

ORDER

It is hereby **ORDERED, ADJUDGED AND DECREED** that:

(1) Employer/Carrier shall pay to Claimant compensation for temporary total disability benefits from July 14, 1998 to February 15, 1999, the date of maximum medical improvement, based on an average weekly wage of $208.94;

(2) Employer/Carrier shall pay to Claimant compensation for permanent total disability benefits from February 15, 1999, and continuing, based on an average weekly wage of $208.94.

(2) Employer/Carrier shall pay or reimburse Claimant for all reasonable and necessary medical expenses, resulting from Claimant's injuries of July 14, 1998.

(3) Employer/Carrier shall be entitled to a credit for all payments of compensation previously made to Claimant;

(4) Employer/Carrier shall pay interest on all of the above sums determined to be in arrears as of the date of service of this ORDER at the rate provided by in 28 U.S.C. §1961 and Grant v. Portland Stevedoring Co., 16 BRBS 267 (1984);

(5) Claimant's counsel shall have twenty days from receipt of this Order in which to file a fully supported attorney fee petition and simultaneously to serve a copy on opposing counsel. Thereafter, Employer shall have ten (10) days from receipt of the fee petition in which to file a response.

(6) All computations of benefits and other calculations which may be provided for in this ORDER are subject to verification and adjustment by the District Director.

Entered this 25th day of October, 2004, at Metairie, Louisiana.

A

C. RICHARD AVERY
Administrative Law Judge

CRA:bbd